93-703

SUPREME COURT, U.S.
FILED
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

HOWARD C. MEDLEY,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. In light of the recent Supreme Court decision in *McCormick v. United States*, did the evidence in this cause, viewed in the light most favorable to the government, fail to establish that the Petitioner's conduct constituted the offense of corruptly accepting a thing of value, in violation of 18 U.S.C. § 666?

II. Was the Petitioner deprived of effective assistance of counsel where counsel's decisions so prejudiced him at trial that they substantially contributed to the Petitioner's conviction?

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iii |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| ARGUMENT: | |
| I. In light of the recent Supreme Court decision in *McCormick v. United States*, did the evidence in this cause, viewed in the light most favorable to the government, fail to establish that the Petitioner's conduct constituted the offense of corruptly accepting a thing of value, in violation of 18 U.S.C. § 666? | 4 |
| II. Was the Petitioner deprived of effective assistance of counsel where counsel's decisions so prejudiced him at trial that they substantially contributed to the Petitioner's conviction? | 5 |
| CONCLUSION | 13 |

## INDEX TO APPENDICES

PAGE

A—Unpublished Opinion of the Court of Appeals *Medley v. United States* (No. 92-2833; August 2, 1993) ..... A-1

B—Unpublished Memorandum Opinion of the District Court for the Northern District of Illinois . B-1

C—Original Opinion of the Court of Appeals reported in *United States v. Medley*, 913 F.2d 1248 (7th Cir. 1990) ..... C-1

D—Character Reference Letter for Howard C. Medley from Clark Burrus, Chairman, Chicago Transit Authority, to the Honorable Charles Kocoras, Judge, United States District Court, Northern District of Illinois, December 13, 1989 . D-1

## TABLE OF AUTHORITIES

*Cases*

PAGE

*McCormick v. United States*, 111 S. Ct. 1807 (1991) . 3, 4

*Strickland v. Washington*, 466 U.S. 668 (1984) ... 3, 4, 5

*Statutes*

United States Code, Title 18, Section 666 ..... 2

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**UNITED STATES OF AMERICA,**

*Respondent.*

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

Petitioner, Howard Medley, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit denying his habeas petition to vacate his sentence pursuant to 28 U.S.C. § 2255.

## OPINIONS BELOW

The unpublished opinion of the Court of Appeals is *Medley v. United States* (No. 92-2833; August 2, 1993) and appears as Appendix A to this Petition. The unpublished memorandum opinion of the district court is *United States v. Medley* (No. 92 C 1062; Judge Charles P. Kocoras) and appears as Appendix B to this Petition. Additional background of this case can be found in the original appeal

of conviction, *United States v. Medley*, 913 F.2d 1248 (7th Cir. 1990) and appears as Appendix C to this Petition.

## JURISDICTION

The Seventh Circuit Court of Appeals opinion in this matter was filed on August 3, 1993. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 666 provides in pertinent part:

> (a) Whoever
>
> (1) being an agent of an organization, or of a state, local or Indian tribal government, or any agency thereof
>
> (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of any such organization, government, or agency involving any thing of value of $5,000 or more . . .
>
> shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 666

## STATEMENT OF THE CASE

The United States District Court, Northern District of Illinois, Eastern Division, had jurisdiction pursuant to Title 18 U.S.C. § 3231.

Howard C. Medley was originally tried for violations of corruptly accepting a thing of value under 18 U.S.C. § 666,

and perjury under 18 U.S.C. § 1623. After eleven days of trial and three days of jury deliberations, the jury was deadlocked and a mistrial was had.

He was thereafter retried on solely the charge of corruptly accepting things of value. During the six day trial, following the advise of his counsel, Mr. Medley did not testify and did not offer any evidence on his own behalf. The jury found him guilty, and Medley was sentenced to thirty months imprisonment and a fine of $10,000.

Medley appealed to the Seventh Circuit Court of Appeals and his conviction was affirmed in *United States v. Medley*, 913 F.2d 1248 (7th Cir. 1990). On appeal he argued that the district court erroneously permitted the government to call Brian Flisk as its witness, that the court erred in its jury instructions, and that the court erred in denying his motion for acquittal because the evidence did not establish the elements of the offense charged.

Medley served his prison term, and while serving his term of release, Medley filed a habeas petition seeking to vacate his conviction under 18 U.S.C. § 2255. In his petition, Medley claimed that he was deprived of the right to effective assistance of counsel, pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), and that the conduct for which he was charged and tried did not constitute a crime, pursuant to *McCormick v. United States*, 111 S. Ct. 1807 (1991). The petition was denied without a hearing on the merits. See Appendix B.

Medley appealed the decision of the district court denying him § 2255 relief. The Seventh Circuit ruled only that the case was not moot and referred to the district court's findings that counsel's actions and decisions at trial did not amount to ineffective assistance of counsel and that

*McCormick* was limited in its principles to cases involving campaign contributions and, additionally, Medley's jury did focus on the "quid pro quo" requirement mandated by *McCormick*.

Medley asks this Court to review the decision of the Seventh Circuit denying him § 2255 relief. He believes that, together with the facts of the case, the court's decision is contrary to the principles announced in *McCormick* and *Strickland*.

## ARGUMENT

### I.

**In light of the recent Supreme Court decision in *McCormick v. United States*, did the evidence in this cause, viewed in the light most favorable to the government, fail to establish that the Petitioner's conduct constituted the offense of corruptly accepting a thing of value, in violation of 18 U.S.C. § 666?**

*McCormick v. United States*, 111 S. Ct. 1807 (1991), requires that this Court vacate Medley's sentence. *McCormick* held that a conviction under the Hobbs Act for extortion by a state legislator, where the legislator was accused of accepting campaign contributions in exchange for sponsoring favorable legislation, required specific proof of a "quid pro quo", a promise in exchange for a payment. The proof did not meet this standard and the legislator's conviction was vacated.

This standard should also apply to this very similar case involving similar accusations. Medley was convicted of taking money in exchange for a real promise or undertaking by Medley.

Applying this standard, the government's case falls short of proving beyond a reasonable doubt any wrong-

doing on his part. The only evidence presented at Medley's trial was that Flisk was trying to influence Medley to help with his CTA contracts, but there was no evidence presented that Medley knew of this scheme or that he participated in it.

The trial transcripts reflect that Medley did not break the law. The property owners repeatedly insisted that they be allowed to bestow upon Medley a reward because, as they put it, "the building had been a pain in the butt and they felt indebted for the introduction to the buyers." Medley did not seek a gift, nor did he seek a fee. Medley was never shown to have taken anything of value with corrupt intent, nor was any quid pro quo ever established by the government. This conviction cannot stand.

## II.

**Was the Petitioner deprived of effective assistance of counsel where counsel's decisions so prejudiced him at trial that they substantially contributed to the Petitioner's conviction?**

The Sixth Amendment guarantees the right to all defendants that they shall receive effective assistance of counsel. Under the strictures of *Strickland v. Washington*, 466 U.S. 668 (1984), this right has been held to mean that a fair trial is not received by the defendant when his counsel's conduct so undermines the adversarial process that the trial cannot be relied as having produced a just result. Counsel's conduct and decisions throughout Petitioner's trial undermined the adversarial process in that there was virtually no adversary to the government's contentions. The trial was thus unreliable as to whether a just result was in fact had. This claim is brought to light by the many damaging and poorly informed decisions and actions of the Petitioner's trial counsel.

Counsel was not prepared for the change in the government's theory from the first to the second trials, from the theory of "bribery" to the theory of "influence peddling". The first theory failed for the government in the first trial because they could not show that Petitioner knowingly accepted anything of value in exchange for something in the future or present. The actions and intent needed to prove "influence peddling" is less clear. Counsel felt he could take the same tack at trial as the first counsel and, in doing so, failed to realize the subtleties involved in the government's changed strategy.

Counsel also failed to object to a jury instruction submitted by the government that removed the word "corrupt" from the definition of the intent needed to convict the Petitioner. This instruction went to the jury and was crucial in convicting the Petitioner since the government could never have shown Petitioner to have "corruptly" taken anything.

Counsel's treatment of the government's witnesses was also damaging. Counsel failed to cross-examine some witnesses effectively, and failed to elicit helpful testimony from others. There is simply no accounting for the harm that was done to the Petitioner's case by these mistakes.

Finally, not only did counsel fail completely to put on any case of any substance for the Petitioner, but he convinced Petitioner not to testify in his own defense by telling Medley that, since the government did not prove their case, his testimony would be overkill. This further left the jury with nothing to consider from the Petitioner's side of the story. Petitioner's testimony would have been the truth about this fateful meeting and transaction, and would have exonerated the Petitioner since it would have proved that he never corruptly accepted anything, and

that if he did accept anything, he did so unwittingly. The following would have been the Petitioner's testimony:

* * *

Medley was appointed by the late mayor Richard J. Daley along with two other persons to serve as the Chicago Board of Elections Commissioners.

The three retained the services of a law firm that assigned attorney Robert Sperling to assist them on legal matters of the board. Attorney Sperling informed Medley one day that he was also representing a currency exchange group that was trying to obtain a rate increase for cashing checks and the legislation had to be passed in Springfield for that to occur. He said State Representative Harold Washington was opposing it. He asked if Medley would introduce him to the State Representative Harold Washington. He did make the formal introduction. Medley later found that the two of them worked together and worked out an agreement that would have a lesser impact on fixed income persons.

In 1979, former Mayor Michael Bilandic, during his tenure as mayor, appointed Medley to the Chicago Transit Board of Commissioners. Attorney Sperling and Medley had a good relationship and Sperling would call and invite Medley on occasions to lunch in his dining room or his office. His law firm also represented Medley's company in a labor dispute once.

One day during a conversation at his office, Sperling informed Medley that he was interested in selling a piece of property located at 48th and Central in Chicago. Medley expressed dissatisfaction in the location. Nevertheless, Sperling insisted that Medley go look at it and then make a decision. Medley did look at it and felt that the area was not suitable.

Medley also maintained a very close relationship with the late Mayor Harold Washington, working with him in his elections from time-to-time. In 1987, when working with him on his Mayoral re-election campaign, the senior partners, Mr. Sperling and Mr. Zavis and Medley arranged a breakfast fund raiser for him at their offices. This firm is one of the largest in the city, engaging approximately 350 lawyers who made contributions to the campaign fund. Medley escorted the Mayor to and from the fund raiser.

An associate phoned Medley at CTA and expressed his desire to introduce two of his friends. They wanted to talk to Medley in regards to CTA and to purchase fund raising tickets for Harold Washington. Medley gave them an appointment for the 6th of March. The persons he introduced Medley to were Brian Flisk, Howard Weitzman and Mr. Casey.

When Mr. Flisk entered Medley's office he made a statement that he wanted to buy tickets for the Mayor's election campaign because he was doing a lot of business with the city and CTA and he hadn't bought any tickets for the Mayor's reelection campaign. His statement surprised Mr. Medley so Medley tried to "set the record straight" and informed him that he knew nothing about his contracts with the city or any other governmental agencies but that the tickets he had asked to purchase would not have any effect one way or the other on his "contracts" with the CTA. Flisk said he understood that. Medley told Flisk that he shouldn't even talk to him about any legislation that Medley might have to vote on because then Medley would have to abstain from voting. He informed Medley that he wasn't trying to get a contract with the CTA. Flisk stated that he already had a contract with the CTA and that they were also alleging he was selling watered down fuel.

Medley then stated "let's get this straight, if I find that you are selling any watered down fuel I will take the contract and if you're using a phony minority, I will also take the contract." Flisk said "this is my minority person, you can see he's black," referring to Mr. Casey. Medley informed him that he did not approve of a "front" as a minority firm and inquired as to whether the person was actually performing work.

Medley then called in Mr. Murphy who was in charge of the minority contracts. Murphy stated "Commissioner, the CTA never gave me the necessary personnel to go out and check every contract to make sure that the minority was performing as they should. I do know that the man has filled out the necessary papers to qualify him as being a minority." Medley was suspicious of possible wrong doing ("phony minority") and called in the person in charge of investigations, Mr. Charlie Glass, a retired Chicago police lieutenant.

Mr. Glass investigated and informed Medley there were ten (10) trucks with the name of Casey on the door. Medley asked him if they were registered in Casey's name, license plates, etc., and did he have authorization to operate the trucks? Mr. Glass replied that he had not gone "that far" in his investigation. Medley asked him would he please complete a full investigation that would confirm the man was actually participating as a minority. Mr. Glass later informed Medley that the license plates were in Casey's name and the trucks were registered in Casey's name by the Secretary of State.

Medley then asked Mr. Snyder, the person in charge of fuel, about the newspaper allegation of receiving watered down fuel.

Mr. Snyder informed Medley that our tanks "had a history of water seepage and it probably was our tanks." CTA personnel had been testing fuel wrong. They were testing the fuel after it had been put in the tanks. Mr. Snyder later issued orders correcting the testing procedures.

In a meeting of the board in executive session, Medley informed the board members that he was looking into a minority participant. Chairman Walter Clark informed the members of his personal knowledge of Casey Fuel being a bona fide minority. Medley further informed the board of what Mr. Snyder had said about the fuel testing procedures. Medley told him to make sure all of the facts and evidence were obtained that would produce a strong case in court.

Mr. Flisk phoned Medley regarding the tickets he had requested to purchase for the Mayor's fund raiser. They agreed to meet at a local restaurant near Medley's home for this transaction. During the meeting, Mr. Weitzman, Flisk's partner informed Medley "they often purchase tickets for community and political affairs, let us know when you have fund raising events and possibly we can obtain tickets from time-to-time." Medley thanked him and told him that at the present time he was on three committees, one of which was the NAACP. Mr. Weitzman expressed that his father always took a table for the NAACP and said to let him know when that fund raiser came up. Medley informed him that one was coming up soon and he had some tickets. He asked if Medley had the tickets with him. Medley said no but since "I live one block away, I'll get them for you."

Mr. Weitzman stated "Medley, I've known you for a long time, I knew you from the old Metcalf days when

he rented office space from me on 47th Street. I don't think you remember me, you really have moved up. I remember when you were in that small place on 79th Street and you outgrew it and moved to the huge building on 95th Street. How's business?" Medley informed him that business was good and that he had trucks parked in several locations and had been looking for a place to keep everything in one location and had found one that was large enough but he did not like the area where it was located.

They mentioned that they had also been looking for a place where they could put everything "under one roof" since they had outgrown their present facilities also. They wanted to know if the place Medley had been in was still for sale and how big it was. Medley told them it was about three blocks long and that he had the owner's phone number. He called Mr. Sperling and informed him of some persons interested in talking with him about his building. He then gave the phone to one of them.

Later, Mr. Flisk called to give Medley the check to pay for the tickets. He informed him that he was delivering some fuel to the 69th Street garage and he had seen the fuel cap off of the tank, that it had been raining and he wanted to show him why "water was getting into the tanks." He asked him to come to the garage to see. This was beneficial to the CTA's watered fuel issue and naturally Medley went. There he saw that it had been raining and water was sitting in little puddles around the tank. The top wasn't off of the tank then. Flisk had attempted to take pictures of it to show but was stopped by CTA employees. He asked Medley if he could take pictures. Medley said he could not.

The bus servicer had taken samples of the fuel and was shaking them. He stated that they looked "cloudy" and

told his supervisor that he didn't believe that the CTA should take the fuel. He said "it didn't look right." Medley reminded the supervisor that it had not been established that visual analysis was an acceptable testing method, that he should send it to the lab. He agreed.

Mr. Sperling phoned Medley in late March or early April and invited him to lunch, at which time he informed Medley that the person he had introduced him to seemed to be interested in purchasing the property and that there was going to be a big commission in it for him. Medley responded that he was not interested in a commission. Sperling said that it was already in the contract that the seller will be paid a commission and that Medley was now the seller. Medley said thanks but no thanks, that the money would just be a tax burden and that he didn't need it. He immediately got up to leave the office. Mr. Zavis then escorted him to the elevator. Mr. Zavis persisted saying that "I heard what you told Mr. Sperling but I feel we owe you something, the building has been a pain in the butt." He was determined to compensate Medley in some way for the original introduction. He said Medley could give it to any of his favorite charities. In order to convince Medley to accept the finder's fee he suggested ways in which Medley would not encounter a tax burden. The elevator came. Medley entered the elevator saying "Okay, okay, if you just want to give me something, I'll find something to do with it, but you don't owe me anything."

Medley thought that was the end of everything but Sperling called later and told him that the people he introduced him to really were going to buy the building. Sperling told Medley that he needed to have a broker's license to be the broker of record. He stated that without a license Medley could not receive the commission. Medley responded that he didn't have a broker's license so he

would have to decline. Sperling said that he should get a licensed broker to act on his behalf.

Medley asked a friend if he had a broker's license. He responded that he did not but suggested John Wilson. They called Mr. Wilson, a certified public accountant and gave him the telephone number of Mr. Zavis and Mr. Sperling.

The next time Medley heard from Mr. Wilson, Wilson informed him that he had a check for $25,000 and inquired as to how should he handle it? Medley said that anyway he decided was fine. Wilson said that he'd put it in the bank and take 10% ($2,500) after the check cleared. Medley said it made no difference.

Mr. Wilson called a couple of days later and sent a check over for $22,500. Medley deposited it into a personal bank account and reported it on his federal income tax.

## CONCLUSION

It appears from this case that the old adages of "listen and follow the advice of your lawyer" and "a man is innocent until proven guilty" are no longer accurate. Grievous injustice has befallen Howard Medley in this case.

We are all taught that to be found guilty of a crime, the burden of proof is on the government to present solid evidence of a crime—evidence that shows the defendant did something as documented by 1) witnesses to the action 2) tapes which recorded the action being committed or discussed 3) or statements of the defendant showing he committed the crime.

In Medley's case none of the above were submitted by the prosecution, instead, a theory of what a crooked politi-

cian *might* or *may* have done was presented. We ask that this Court enforce the definition of proof and evidence, and return the right decision which will begin to restore the aforementioned principles, remove the blot on the Medley name, a name that has always carried great dignity, honor and an unblemished reputation.

The Petitioner's history is that of an honest man. At the time of the false charges, he was a member of the Board of Directors of Seaway National Bank (the oldest and largest Black owned financial institution in America), and Vice-Chairman of Chicago Transit Authority (a City government organization employing 13,000 employees and operating on an approximate budget of a billion dollars). These were just two of a variety of many community and charitable organizations that respected Medley as an honest and successful businessman, one who pulled himself up by his boot straps to become owner of one of the largest Black businesses in the State of Illinois. It was not in Medley's interest or character to be "bought".

As a direct result of this injustice, Medley lost these positions and his reputation. Though the custody has been completed, the trauma and devastation is as raw and painful today as it was at the time of the conviction. Since then, he has relentlessly fought to prove his innocence.

The fight has resulted in a tremendous cost from two aspects. First, in terms of time, and secondly, money. The monetary cost of this fight has been staggering and borne solely by Medley. If Medley was in fact guilty, would he continue to fight at such great expense? The answer is no. The time has already been served and a guilty man would have just put it behind him.

Medley, for his own, his family, and his community's sake, continues to seek justice. The mental anguish caused

by this situation is overwhelming. Medley thanks God every day for sustaining him throughout this ordeal and prays that the fairness of this Honorable Court will permit the consideration of this Petition and let justice prevail.

Medley earnestly beseeches the Court to indepthly read the trial transcripts which if so done will reveal the facts of the case, thereby reflecting his innocence. Further, he states, "If the owners of the property, two senior partners of Katten-Muchin law firm, violated the law by deciding of their own accord to negotiate with Flisk a finder's fee, without his knowledge or agreement and most emphatically not at his request, then they or anyone who broke the law should be punished."

The trial transcripts will show the property owners repeatedly insisted that *they* wanted to bestow a reward upon Medley because as they put it "the building had been a pain in the butt and they felt indebted to him for the introduction to the buyers."

The transcripts show that Medley did three things, none of which classify as a crime:

1. He was over zealous in his commitment to duty as such; he did investigate the complaint of Brian Flisk. This was not out of character for Medley (see statement of CTA Chairman Clark Burrus) (Appendix D).

2. Medley was deeply devoted to the late Mayor Harold Washington and worked tirelessly on his re-election fund raising committee. In so doing, he innocently met with Flisk and Weitzman to collect for fund raiser tickets. A meeting where a request for additional tickets, coincidentally led him to his home to get the tickets for the NAACP where he also served on that fund raising committee.

3. He trusted individuals with whom he had maintained a long term social relationship. Attorneys Sperling and Zavis who either set Medley up for these

false accusations or who unwittingly believed their real estate venture, which called for a finders fee to Medley, was completely legal. In each of these roles, Medley's actions were not motivated by financial gain to him.

For the reasons set forth above, Petitioner, Howard Medley, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit denying his habeas petition to vacate his sentence pursuant to 28 U.S.C. § 2255.

Respectfully submitted,

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*Petitioner Pro Se*

# APPENDICES

# APPENDIX A

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 53]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued July 8, 1993
August 2, 1993

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge
Hon. Jesse E. Eschbach, Senior Circuit Judge

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Howard C. Medley, Sr.,
*Petitioner/Appellant,*

No. 92-2833 v.

United States of America,
*Respondent/Appellee.*

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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 1062—Charles P. Kocoras, *Judge.*

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## ORDER

A jury convicted Howard Medley of accepting a $25,000 check from a contractor with the intent to be influenced in his duties as a board member of the Chicago Transit Authority, in violation of 18 U.S.C. § 666. Medley appealed his conviction to this court, and we affirmed. *United States v. Medley*, 913 F.2d 1248 (7th Cir. 1990). He then filed a petition to vacate his sentence, 28 U.S.C. § 2255,

claiming that his trial counsel was ineffective and that the Supreme Court's recent decision in *McCormick v. United States*, 111 S. Ct. 1807 (1991), requires the court to overturn his conviction. We affirm.

At the threshold we must decide if this case is moot. Both parties argued that this case was not moot, therefore the issue need not detain us long. "[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Sibron v. New York*, 392 U.S. 40, 57 (1968); *Carafas v. LaValle*, 391 U.S. 234, 237-38 (1968); *but see Lane v. Williams*, 455 U.S. 624, 632 (1982) (no collateral legal consequence arose because "employment prospects, or the sentence imposed in a future criminal proceeding, could be affected"); *Wickstrom v. Schardt*, 798 F.2d 268, 270 (7th Cir. 1986) (per curiam) (effect of conviction on reputation is not a collateral legal consequence); *cf. Maleng v. Cook*, 490 U.S. 488, 492 (1988) (per curiam) (petitioner is no longer "in custody" as required by the habeas statute just because there is a possibility of a future sentence being enhanced by a prior conviction, the sentence of which has been fully served). In *D.S.A. v. Circuit Court Branch 1*, this court noted "that a criminal record that might affect a later sentence is a sufficient collateral consequence to save an appeal from mootness." 942 F.2d 1143, 1149 (7th Cir. 1991) (citing *Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985)). *D.S.A.* requires that we find that this case is not moot.

Medley has raised on appeal the same two issues that he raised before Judge Kocoras: 1) that his trial counsel made such poor decisions that his performance violated Medley's constitutional right to effective assistance of counsel, and 2) that in light of *McCormick v. United*

*States*, 111 S. Ct. 1807 (1991), this court should overrule his conviction. We have reviewed the district court's thorough opinion, which addressed these claims thoroughly and accurately. We AFFIRM for the reasons set forth in that opinion, which is attached.

# APPENDIX B

[Dated July 16, 1992]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Petitioner, | ) | 88 CR 297-3 |
| v. | ) | |
| | ) | |
| HOWARD C. MEDLEY, SR., | ) | 92 C 1062 |
| | ) | |
| Respondent. | ) | |

## MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on defendant's habeas petition to vacate a sentence pursuant to 28 U.S.C. § 2255. For the reasons set forth below, we deny the petition.

## BACKGROUND

### A. *Procedural History*

Howard Medley ("Medley"), petitioner, along with eight other defendants were first indicted in April 1988. The indictment arose out of the Chicago Transit Authority's ("CTA") relationship with Metropolitan Petroleum Company (Metropolitan), a privately owned motor fuel supplier. Medley was a CTA board member. Also indicted were Metropolitan and Brian Flisk ("Flisk"), an officer of Metropolitan.

Medley was indicted for perjury and accepting a thing of value with the intent to be influenced or rewarded in violation of 18 U.S.C. § 666.[1] Medley's initial trial lasted eleven days, and after three days of deliberation, the jury was deadlocked, and a mistrial was declared.

Subsequently, a superseding indictment was returned, again charging Medley with violating section 666. At Medley's second trial, Flisk testified as a government witness. In between Medley's first and second trial, Flisk pleaded guilty to a number of related charges. Medley's second trial lasted six days. Medley neither testified, nor presented any meaningful evidence on his behalf. Medley was represented by different counsel at his second trial. After its deliberations, the jury concluded that Medley was guilty of accepting and agreeing to accept $25,000 from Flisk with the intent to be influenced and rewarded in his duties as a CTA board member. Accordingly, Medley was sentenced to thirty months in jail and fined $10,000.

Although Medley raised three issues on appeal,[2] the Seventh Circuit affirmed his conviction. Medley was paroled

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[1] 18 U.S.C. § 666 provides in pertinent part:

> [whoever] corruptly solicits or demands for the benefit of any person, or accepts or agrees intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more . . . shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 666.

[2] Medley contended that the Court erred by: (1) permitting the government to call Flisk as its witness; (2) instructing the jury as we did; and (3) denying Medley's motions for acquittal which argued that the evidence did not prove beyond a reasonable doubt that the money actually paid to Medley by a person named John Wilson was a thing of value from Flisk and Metropolitan as charged in the indictment. *U.S. v. Medley*, 913 F.2d 1248, 1251 (7th Cir. 1990).

on December 5, 1990. He is presently living in Chicago and is under the supervision of the United States Probation Service. Medley's sentence expires on September 20, 1992.

B. *Factual Background*[3]

In October, 1986, Flisk ran Metropolitan. At that time, the company entered into two, two-year contracts with the CTA to be its exclusive supplier of diesel fuel. These contracts were valued at $38 million and were Metropolitan's most important contracts. Flisk obtained the fuel contracts by representing that the CTA would receive substantial discounts if it paid its bills within specified time periods. Flisk also agreed to meet the CTA's Minority Business Enterprise requirement by specifying Casey Fuels as a minority-run subcontractor that would deliver part of Metropolitan's fuel to the CTA.

Contrary to Flisk's belief, the CTA paid its bills promptly. As a result, Metropolitan began losing money at a "devastating" rate. To combat these losses, Flisk began sending the CTA late or fraudulently inflated invoices. The CTA's Internal Audit division became suspicious and began investigating Metropolitan in late November and early December of 1986. Flisk learned of this investigation in January, 1987 and feared that Metropolitan would go out of business if the CTA cancelled its contracts.[4]

At or around this time, in late January or early February, Medley, while acting as a CTA board member,

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[3] We deny Medley's request for an evidentiary hearing on the issues raised in this petition.

[4] True to his concern, this is exactly what happened in July, 1987.

learned from his longtime lawyer friend, Robert Sperling, that he and other individuals who owned a large commercial warehouse were desparately looking for a buyer and that a substantial commission would be paid to anyone who could find such a party.

While Medley was keeping an eye out for such a buyer, Flisk turned to Medley for assistance in connection with the CTA's investigation of Metropolitan. Howard Weitzman ("Weitzman"), Flisk's personal friend and Metropolitan business partner, arranged a meeting in Medley's CTA office. Later, Medley, Flisk, and Weitzman had a second meeting which ended up at Medley's apartment. At the apartment meeting, Flisk and Medley discussed CTA matters, Metropolitan's fuel contract, and Medley's needed assistance with Metropolitan's "problem." According to Flisk's testimony, Medley also suggested that Flisk purchase Sperling's warehouse. Flisk learned that Medley stood to gain a $300,000 commission if he located a buyer for the building. According to Flisk, he was willing to pay this commission because Medley was "helping" him with the CTA investigation. Indeed, at trial, Flisk referred to the warehouse commission as the "*quid pro quo*" for Medley's help.

After the apartment meeting, Medley called Sperling and informed him that he knew of an individual interested in the warehouse. Upon Medley's recommendation, Flisk and Weitzman examined the property, and negotiations with Sperling and his partners for the sale or lease of the warehouse began soon thereafter.

While negotiations continued, on February 20, 1987, the CTA's Audit division disseminated the results of its investigation of Metropolitan to CTA board members. The report criticized Metropolitan's tardy billings and ques-

tioned the validity of Casey Fuels as a legitimate minority enterprise.

Subsequently, at a public board meeting on March 4, 1987, board member John Hoellen cited the Audit report as support to terminate Metropolitan's contract. In response, Medley spoke out about a conversation he said he had had about the report with the CTA's purchasing agent, Ed Tobin. Tobin, however, denied that he had spoken to Medley about the report. These conversations ceased when potential litigation with Metropolitan was mentioned. The investigation was then referred to the CTA Purchases and Sales Committee for a report back to the board.

Natalia Delgado ("Delgado") chaired the CTA's Purchases and Sales Committee. During a ten minute intermission between open and closed board meetings on March 4, 1987, Medley approached Delgado. Medley informed Delgado that Casey Fuels was actually getting ready to deliver fuel and that unknown persons were "out to get Metropolitan because they didn't like minority subcontracts."

Two days later, Medley called the CTA affirmative action staff head Larry Murphy ("Murphy") into his office. When Murphy arrived, Flisk and Clarence Casey, owner of Casey Fuels, were present. Medley told Murphy to prepare a report proving that Casey Fuels was in fact participating in the Metropolitan contract. When Murphy replied that he had no information to substantiate such a claim, Medley directed Casey and Flisk to provide the necessary information.

Immediately after speaking with Murphy, Medley called CTA senior staffer and purchasing agent Tobin into his office. When he arrived, Medley, Flisk, Casey, and Mur-

phy were all present. Medley informed Tobin that he was looking into the minority subcontractor and invoicing allegations in the Audit report. Tobin warned Medley not to discuss the matter in front of the subjects of the investigation because of the possibility of future litigation. Tobin was so disturbed by Medley's conduct that he immediately went to the CTA staff chairman and wrote a memo detailing what had occurred in Medley's office.

A week later, Medley, again in the presence of Flisk and Casey, gave Murphy a stack of papers from Flisk and told Murphy to "go back and take care of the minority." A week later Medley called Murphy into his office regarding Murphy's report. Murphy informed Medley that the papers were irrelevant, and therefore no report was written. Medley responded, "O.K. That's all." Medley never informed the CTA board that Metropolitan and Casey's evidence on the minority issue was meritless.

On March 17, 1987, Internal Audit issued a second critical report of Metropolitan. This report expressed concern over the quality of diesel fuel tested from Metropolitan's trucks. On March 19, 1987, CTA employees were told to visually examine Metropolitan's fuel for particles and water. On that day, Byron Harvey took a fuel sample from a Metropolitan delivery truck. After examining the sample, Harvey brought it to his supervisor, Terry Short. Short agreed with Harvey that the sample looked too light and cloudy and therefore should be rejected. By the time these individuals returned to the Metropolitan fuel truck, however, Flisk had arrived. Additionally, within minutes of Flisk's arrival, Medley was on the scene. Flisk admitted to calling Medley to assist him at the garage. Additionally, both Harvey and Short testified that they had never seen Medley at the garage either before or since that time.

While at the garage, Medley initially spoke to Flisk. He then approached supervisor Short who informed Medley that the fuel sample was taken from Metropolitan's truck. Medley informed Short that the fuel looked acceptable to him. Consequently, Short accepted the delivery.

On the same day, Medley also called Delgado at her law firm. Medley told her that Casey Fuels was delivering the fuel and that fuel samples were erroneously being taken from underground tanks, not delivery trucks. Delgado testified that the call was unusual because Medley had never, except one time before, called her at her firm to discuss substantive board matters. During this conversation, Medley also arranged a personal meeting with Delgado for the next day to discuss the Metropolitan issue. Delgado, however, canceled this meeting because of an emergency legal matter at her office. Immediately after hanging up with Delgado, Medley called Sperling. Phone records for the remainder of the day showed numerous calls between Medley and Flisk, Medley and Sperling, Flisk and Sperling, and Medley and John Wilson, Medley's accountant who later accepted a $25,000 check from Flisk delivered to him by Weitzman for Medley.

Five days later, on March 24, Medley called Delgado at her office again. This was the day before a scheduled CTA Purchases and Sales Committee meeting. Medley again told Delgado that Casey Fuels was in fact delivering fuel under the contract. Delgado testified that Medley further informed her that he had gone to examine water seepage at the CTA's underground fuel tanks and that the Metropolitan fuel quality samples were inaccurate because they were being taken from water soaked fuel tanks, not Metropolitan fuel trucks. Medley also told her that people were "out to get Metropolitan Petroleum." Medley did not tell Delgado that he had gone to the

garage the previous week at Flisk's behest, that the sample at the garage was taken from a Metropolitan truck, or that there was no water over the fuel tanks at that time.

The next day, March 25, 1987, the Purchases and Sales Committee met to discuss whether to recommend the termination of Metropolitan's contract. Delgado reported what Medley had told her about Casey Fuels delivering the fuel and offered Medley's explanation for the questionable fuel quality samples. Based on this and other information, the committee recommended against termination.

Around this time, late March, 1987, Medley had a conversation with Sperling's partner, Michael Zavis. Zavis told Medley that the real estate partnership could not afford to pay Medley any commission on the warehouse deal but that Zavis would negotiate with the buyers, Flisk and Weitzman, to pay it. Zavis informed Medley that he would get one-half of the commission and that Zavis and Sperling would receive one-quarter each. Soon thereafter, Zavis had a meeting with Flisk during which Flisk agreed to pay a $300,000 commission.

In late March, the deal was ready to be consummated. Sperling, however, called Medley and informed him that only licensed real estate brokers could receive a real estate commission. Because Medley was not a licensed broker, Sperling suggested that Medley either: (1) designate a real estate broker to accept his share as a favor; (2) designate a charity to be paid his share; or (3) request that his share be paid as a political contribution. Medley replied that he wanted to consider the matter. A short time before March 31, 1987, Medley called Zavis and told him that John Wilson ("Wilson") was to receive Medley's commission of $150,000. Zavis called Wilson, learned that

he was a licensed real estate broker, and provided his name to Flisk's attorney so that the commission check could be made out correctly.

Around this time, Medley met with Wilson regarding the commission. Wilson was Medley's accountant. Medley told Wilson that he had earned a fee in a real estate transaction but that the parties involved "were balking about it" because they wanted a licensed real estate broker "to accept the money." Medley then told Wilson that he wanted Wilson to accept the money for him. With Medley present, Wilson called his attorney regarding Medley's suggestion. Wilson's attorney advised them that Wilson could not share a commission with a nonlicensed broker. The lawyer, however, said that he would get back to them about the possibility of sharing the money if it were characterized as a finders fee. The lawyer never got back to Wilson, and Wilson and Medley had no further conversations regarding the legality of sharing the commission.

While the real estate deal was drawing closer to completion, the CTA's board held a closed meeting on April 1, 1987 to discuss the allegations surrounding Metropolitan. Delgado reported that her committee had recommended against termination based on the same information that Medley had provided her. Medley also spoke at this meeting in support of Metropolitan. In so doing, however, Medley made a number of misrepresentations. Medley lied that he had gone out to the CTA garage and found a foot of standing water around the underground fuel tanks. He also lied when he stated that the fuel samples came from the underground tanks, not Metropolitan's delivery trucks. Moreover, at no time during this meeting did Medley inform the board about his conduct on behalf of Flisk, Weitzman, or Casey or the real estate transaction. At the end

of the meeting, the board voted against terminating Metropolitan's contracts.[5]

On April 10, 1987, Medley met with Sperling. At this time, Medley agreed that Wilson should take six monthly installments of $25,000 for the real estate deal. Subsequently, shortly before April 14, Medley told Wilson that a man named Weitzman would be bringing over a $25,000 check for Medley. After Wilson received the check on April 14, Medley instructed Wilson to keep $2,500 for himself and send him the remaining $22,500.

In early July, 1987, the CTA terminated Metropolitan's contract for fraud. In April 1988, Medley was required to file an economic interest statement with Cook County for 1987 listing "any kind of payment from anyone having a contract or doing business with the CTA." Medley did not list the $22,500 payment from Flisk. Medley, however, did list a $22,500 "finders fee" on his income tax return filed at about the same time with the Internal Revenue Service, but the source of the fee was not shown. Subsequent events led to Medley's indictment and ultimate conviction.

Medley has now filed this petition to vacate his sentence pursuant to 28 U.S.C. § 2255. Medley's bases for this petition is two fold. Medley's first argument is that he was a victim of ineffective assistance of counsel. In support of this claim, Medley highlights a myriad of purported errors. Secondly, Medley argues that the recent Supreme

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[5] Delgado testified that had she known about Medley's relationship with Flisk, she would not have given Medley's statements "anywhere near the weight that I gave them" and that she would not have relayed his comments to her committee but instead would have reported Medley's situation to the CTA's attorney.

Court decision of *McCormick v. United States*, 111 S. Ct. 1807 (1991), requires vacating his sentence. We address these arguments below.

## DISCUSSION

### A. *Ineffective Assistance of Counsel*

Medley's initial argument in support of vacating his sentence is that he was deprived of his constitutional right to effective assistance of counsel at his second trial. Medley makes numerous arguments in support of this claim. We address each argument below. However, because we find these positions meritless, we deny Medley's ineffective assistance argument.

The Sixth Amendment guarantees that criminal defendants will receive effective assistance of counsel. This constitutional right, however, in no way ensures defendants with the best possible defense. *Strickland v. Washington*, 466 U.S. 668, 697 (1984) (acknowledging that the "object of an ineffectiveness claim is not to grade counsel's performance"). Rather, the underlying goal is to ensure that a defendant receives a fundamentally fair trial. *Id.* at 686 & 689. A fair trial is "one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Id.* at 684. As the Supreme Court has recognized, the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

It is in light of this underlying rationale that we must analyze any claim of ineffective assistance of counsel. As

such, the defendant has a heavy burden in demonstrating ineffectiveness. *United States v. Balzano*, 916 F.2d 1273, 1292 (7th Cir. 1990) (acknowledging that defendant "must climb" a "high mountain" to suceed on ineffectiveness claim); *United States v. Moya-Gomez*, 860 F.2d 706, 763 (7th Cir. 1988) (acknowledging that the "defendant bears a heavy burden"), *cert. denied*, 492 U.S. 908 (1989). Specifically, the defendant must show that his counsel's performance was deficient and that this deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Prejudice exists if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[6] *Id.* at 694.

It is unnecessary to examine the first prong of the ineffective assistance test, the reasonableness of counsel's performance, if counsel's conduct caused the defendant no meaningful prejudice. *Id.* at 697 (acknowledging that a court "need not determine whether counsel's performance was deficient . . . [i]f it is easier to dispose of an ineffec-

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[6] As the Court explained in *Strickland*:

> [A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

*Id.* at 695-96.

tiveness claim on the ground of lack of sufficient prejudice, which we expect will often" be the case). With these principles in mind we will address each of Medley's arguments in support of his claim of ineffectiveness.

Medley's first argument is that the "government significantly changed its theory of the case between the first and second trials" and that his trial counsel failed to appreciate this change in strategy. Specifically, Medley maintains that the government's focus at the first trial was on "bribery" while at the second trial "the government abandoned the bribery claim and characterized Medley's conduct as 'influence peddling.' " Medley insists that this misapprehension and fixation on bribery constituted ineffective assistance of counsel.

Even if there were a meaningful distinction between bribery and section 666, Medley has failed to present any particularized example prejudice. Initially, we note that we are not convinced that for purposes of Medley's trial there is a meaningful distinction between bribery and section 666. Medley contends that section 666 requires a showing of a *quid pro quo*, whereas bribery does not. However, this distinction is incorrect. *See* 18 U.S.C.A. § 201(b)(2) (public official takes a bribe when he "corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally . . . *in return for*, [*inter alia*], being influenced in the performance of any official act") (emphasis added); Federal Criminal Jury Instructions of the Seventh Circuit, Vol. III, at 20 (West 1986) (rendering it an unlawful act of bribery for public official to "receive anything of value *for* his official services from any source other than" the United States government) (emphasis added); *see also* Illinois Pattern Jury Instructions, 21.11 (West 2d 1981). Additionally, the Seventh Circuit agreed with our earlier conclusion that "bribery" is

merely a "shorthand' explanation of the [section 666] charge." *Medley*, 913 F.2d at 1258. Thus, we see no valid distinction between the two statutory offenses for purposes of Medley's trial. However, even if Medley's distinction were valid, he has failed to articulate any particular act that his trial counsel would have done differently had he "properly" understood the nature of the charged crime.[7] Accordingly, Medley has failed to demonstrate any prejudice. Therefore, this argument fails to support Medley's claim of ineffectiveness.

Medley's second argument is that his trial counsels' failure to object to the government's jury instruction regarding the section 666 offense constituted ineffective assistance of counsel. Specifically, Medley contends that the instruction failed to inform the jury that a section 666 violation only arises if the thing of value was accepted with a "corrupt" intent. Medley maintains that had the jury been informed as to the statute's mental state requirement, it would have found Medley innocent.

Medley previously raised this issue on appeal, and the Seventh Circuit rejected it. The court held that the absence of the language "corruptly" from the jury instruction did not have "a probable impact on the jury's finding of guilt" and did not amount to "a miscarriage of justice." *Id.* at 1260. In so holding, the court reasoned that "[n]o normal reasonable jury could have misunderstood what the indictment charge was about and what was required to find the defendant guilty." *Id.* at

[7] Medley's conclusory statement that his counsels' fixation on bribery instead of influence peddling was the motivating factor in his counsels' erroneous decision to not present any evidence on his behalf is addressed *infra*.

1261. The court further reasoned that Medley's receipt of money was "either a real estate fee or it was corruption" and that the "instruction given, even without using the word 'corruptly,' would not permit a finding of guilt on some gratuity or real estate fee analysis." *Id.* We agree with the Seventh Circuit's reasoning. Therefore, it necessarily follows that Medley incurred no meaningful prejudice as a result of counsels' failure to object to the government's jury instruction within the meaning of the Sixth Amendment. Accordingly, Medley's jury instruction argument in support of his ineffectiveness claim must also fail.

We reject Medley's argument that his trial counsel committed ineffective assistance of counsel because their errors caused the Seventh Circuit to review the jury instruction issue under a stricter plain error standard. The Seventh Circuit did, in fact, apply a stricter standard of review because of counsel's failure to object to the government's jury instruction and their submission of jury instructions without the "corruptly" language. *Id.* at 1260. Medley insists that had his counsel properly objected to the government's proffer, the Seventh Circuit would have used a less strict standard of review and ultimately would have found in favor of Medley on this issue.

Medley's argument must fail for two reasons. Initially, we note that Medley's position is rife with speculation. It assumes that the government would have objected to the "corruptly" language. This is questionable. Indeed, the Seventh Circuit, on appeal, recognized that the government in fact "argued the case as if 'corruptly' was the standard." *Id.* at 1260. Moreover, even if the government did object, Medley's position further assumes that we would have rejected Medley's objection. We will not engage in such speculation. Secondly, and more important,

is that Medley's argument misses the point. The critical question is whether counsel's errors caused meaningful prejudice with respect to the jury's verdict. The Seventh Circuit and this Court have already concluded that the instruction in question caused no such prejudice. Medley's argument, therefore, is misplaced and rejected.

Medley's third argument in support of his petition, is that his trial counsel made "[s]erious errors . . . with respect to at least ten witnesses who testified at Medley's second trial." Specifically, Medley argues that his counsel "did not ask questions which were asked at [his first trial] and which when asked resulted in answers favorable" to him.

Before addressing those specific points that Medley makes in support of this argument, we make some preliminary observations. Initially, we note that Medley's counsel at the second trial was not obligated to try Medley's case in the same fashion as counsel did for his first trial. *See Strickland*, 466 U.S. at 689 (acknowledging that there are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way"). Indeed, to do so would have been problematic since Medley's first trial resulted in a hung jury, not acquittal, and that was in the absence of Flisk's important testimony for the government. In light of this caveat, we will address the particular lines of testimony that Medley contends deprived him of a fair trial whose result is unreliable.

Medley's initial argument is that numerous individuals could have testified that Medley's "interaction with Board Members regarding Metropolitan Petroleum was not unusual" and indeed "did not go beyond the point of asking

questions, raising issues, and advocating a position." In support of these contentions, Medley states that Mr. Paalswell, CTA's executive director, and Mr. Hillman would have testified that Medley never approached them about Metropolitan. With respect to Delgado, Medley asserts that she could have testified that he "did not go beyond offering her information. As to Murphy, Medley argues that he could have testified that Medley "did not push the issue [the minority status of Casey Fuels] after Murphy stated that he didn't think Metropolitan's data was sufficient." Finally, Medley maintains that Short would have testified that Short accepted the disputed fuel delivery after Medley reminded him of the latest memo covering standard testing procedures requiring lab testing.

We reject these contentions because the failure to elicit this testimony did not in any meaningful way prejudice Medley. With respect to Paaswell and Hillman, we note that evidence of Medley's inaction has little, if any, probative value. Medley's failure to solicit all board members on Metropolitan's behalf in no way mitigates those questionable actions that he did take. Moreover, Medley badly mischaracterizes the nature of his conduct with Delgado. Medley did more than "offer her information." Indeed, he engaged in a preconceived plan of deception and solicitation. Medley never informed her as to his vested interest in Metropolitan's negotiations for the commercial warehouse. He never informed her that Metropolitan had no credible evidence of Casey Fuels' minority status. He also lied when he stated that Metropolitan's fuel samples were erroneously being taken from underground fuel tanks that were submerged under a foot of water. Nor did Medley tell Delgado that he had gone to a CTA garage at Flisk's behest, that the sample at the garage was taken from the Metropolitan truck, or that there was no water

over the fuel tanks at that time. Additionally, the fact that Medley did not push Murphy regarding the Casey Fuels issue, again evidence of Medley's inaction, would have had little if any influence on the jury. Furthermore, as to Short's acceptance of the fuel delivery, Medley has failed to submit the alleged memo. However, even if it did in fact exist, evidence of Medley's other actions on behalf of Metropolitan were more than sufficient for a reasonable jury to convict him. Therefore, because Medley has failed to make the requisite showing of prejudice with respect to this testimony, we reject his reliance on it.

Medley's second contention is that his counsel erred by not eliciting testimony that demonstrated the legitimacy of the real estate transaction. This was not error because the government conceded this fact at Medley's second trial. Therefore, no meaningful prejudice arose.

Medley's third contention turns on testimony regarding Medley's acceptance of his "fee." Medley insists that: (1) the idea of the real estate commission was not his; (2) Medley was not involved in the decision to pay him a fee; (3) Medley "was reluctant to accept a fee and rejected the notion on several occasions"; (4) Medley believed the fee came from Sperling and Zavis not Flisk; and (5) Sperling, Zavis, and Wilson thought the fee was legitimate.

Medley's first and second points, that Sperling would have testified that it was his "original idea" to pay a fee to Medley and that "Medley had no part in the negotiations nor in the decision to include him in the fee payment," would not have changed the jury's decision. Medley ignores the important testimony that he knew, because of his prior discussion with Sperling, that a substantial commission could be made, and he knew this fact when he suggested the deal to Flisk. Thus, there was no constitutional error in failing to elicit this testimony.

Medley also argues that he was reluctant to accept any fee and turned it down numerous times. Medley does not suggest who would have testified to this fact. Moreover, Medley himself chose not to testify. Furthermore, the fact of the matter is that Medley did accept the fee, and the evidence established that he was keenly interested in obtaining it. Medley actively defended Metropolitan in addition to having numerous communications with Sperling and Zavis regarding the state of negotiations. Moreover, Medley also rejected three alternatives which Sperling suggested for Medley's disposition of the money. Indeed, Medley rejected these alternatives in the face of Wilson's attorney's equivocal statement as to the legality of such an enterprise. Therefore, it is doubtful that the jury would have deemed Medley's suggested testimony as credible or persuasive.

Medley also contends that his trial counsel should have elicited testimony regarding Medley's belief that the fee came from Zavis and Sperline, not Metropolitan. Initially, we note that there was testimony to the contrary. Additionally, in order to elicit such testimony, Medley would have had to take the stand. As discussed below, there were substantial risks in this, and it was proper to recommend against doing so.

Moreover, the fact that "neither Zavis nor Sperling, both attorneys, saw anything improper about Medley receiving a fee" for his help is irrelevant. Furthermore, these individuals were unaware of Medley's efforts on behalf of Metropolitan. This is equally true of Wilson. Therefore, trial counsels' failure to elicit this testimony from these individuals regarding their belief as to the propriety of their dealings caused Medley no meaningful prejudice. Accordingly, trial counsels' failure to present the above-mentioned testimony regarding Medley's acceptance of his "fee" did not amount to a constitutional error.

Medley's alternative and final point regarding his counsels' failure to elicit favorable testimony at trial turns on Flisk's testimony. Medley claims that his counsel was ineffective by not playing a secretly recorded conversation between Flisk and a confidential informant, in which Flisk allegedly stated that Medley asked for no money and that no money was paid in return for any action on Medley's part. Evidence of this taped conversation, however, would not have exonerated Medley because it was merely cumulative evidence to Flisk's own testimony. At trial, Flisk repeatedly stated that he did not pay a bribe to Medley. Moreover, to the extent that the taped conversation suggests that Flisk thought the payments were not a *quid pro quo*, that is belied by Flisk's grand jury testimony. Furthermore, Medley contends that Flisk's "*quid pro quo*" comment merely meant that Flisk hoped that Medley would act on his behalf. Counsels' failure to elicit this testimony from Flisk is insufficient to give rise to an ineffective assistance claim. Initially, we note that Medley has not filed any affidavit from Flisk indicating that he would have in fact so testified. Moreover, Flisk's post hoc explanations on cross examination of what he meant by such legal terms as "bribery" and "*quid pro quo*" would have likely been viewed by the jury as biased and questionable at best. Therefore, no meaningful prejudice arose.

Medley's fourth argument in support of his petition is that his trial counsel seriously erred by failing to object to the government's use of Flisk's plea agreement and plea colloquy to impeach Flisk at trial. Medley raised this exact issue on appeal, and the Seventh Circuit rejected it. In addressing the issue, however, the Seventh Circuit noted that Medley's trial counsel only objected to the government's use of Flisk's proffer to an FBI agent in 1987 and not to the government's use of Flisk's plea agreement or plea colloquy. Accordingly, the court analyzed the

issue under a plain error standard. Medley now contends that his "appeal would have been successful" had his attorneys properly objected because the Seventh Circuit would have employed a less stringent standard of review as to the propriety of Flisk's impeachment.

Although Flisk was a government witness, the government could properly impeach his testimony if done in good faith. *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984). Accordingly, government impeachment is impermissible only if it is merely governmental subterfuge to get before the jury evidence otherwise not admissible. *Id.* We reject Medley's argument because there is no evidence in the Seventh Circuit's opinion or elsewhere in the record that the government engaged in any bad faith in calling Flisk to testify or by asking him questions which ultimately led to his impeachment. Indeed, the opposite appears to be the case. *Medley*, 913 F.2d at 1257-58. Nor did the government seek to admit otherwise inadmissible evidence. *Id.* Therefore, Medley's argument that he would have prevailed on appeal had his counsel objected to the government's use of Flisk's plea and plea colloquy is simply insupportable. Accordingly, there was no meaningful prejudice in failing to object.

Medley's fifth argument in support of his petition is that his attorneys made a critical error in advising him not to testify. Medley makes the bolder statement in his affidavit that his counsel did "not allow[ ]" him to testify. With respect to this latter contention, we find it preposterous to believe that Medley's attorneys' coerced him to not testify. Medley himself stated before this Court that, "it is my decision [to not testify] because I felt there was no evidence. So, I felt there wasn't a need to testify." Moreover, there would be no reason for Medley's attorneys to coerce their client. Therefore, we reject this argument as entirely meritless.

It is equally fallacious to contend that counsel's advice not to testify constituted ineffective assistance. The Seventh Circuit has recognized that defense counsel's decision not to put his client on the stand is a "classic example of what might be considered sound trial strategy." *United Sates v. Norwood*, 798 F.2d 1094, 1100 (7th Cir.), *cert. denied*, 479 U.S. 1011 (1986). Indeed, had Medley testified, the government could have admitted damaging evidence to impeach Medley's credibility or expose him to perjury charges, both very real possibilities. Accordingly, Medley's attorneys could have reasonably concluded that his testimony would have done more harm than good to the defense. Their recommendation against testifying, therefore, did not constitute ineffective assistance of counsel.

Finally, defense counsels' failure to present any evidence on behalf of Medley did not constitute ineffective assistance. It is not *per se* ineffective assistance to put on no defense at all. *United States v. Ramsey*, 785 F.2d 184, 194 (7th Cir.), *cert. denied*, 476 U.S. 1186 (1986). Medley's counsels' cross-examination of numerous governmental witnesses, and Flisk in particular, provided a sufficiently meaningful adversarial testing of the government's case. *See Medley*, 913 F.2d at 1258 (lauding counsel's cross-examination of Flisk as "about all the defense Medley had"). Moreover, as discussed above, there is no reasonable likelihood that Medley's jury would have altered its verdict had defense counsel presented the evidence that Medley now contends should have been admitted. This desired evidence would have been of minimal probative value, or insufficient to outweigh the government's substantial evidence, or, indeed, harmful to the defense. Accordingly, no meaningful prejudice arose.

In sum, we have reviewed those purported errors that Medley contends constituted ineffective assistance of coun-

sel. Neither individually nor collectively did these alleged errors meaningfully prejudice Medley. Rather, Medley received a fundamentally fair trial upon which a reliable result was obtained. The Sixth Amendment requires no more, and therefore Medley's ineffective assistance claim must fail.

B. *Impact of McCormick v. United States*

Medley's alternative argument is that *McCormick v. United States*, 111 S. Ct. 1807 (1991), requires vacation of his sentence. *McCormick* involved the indictment of a state legislator under the Hobbs Act for extortion. During his tenure, this state legislator made an agreement with a lobbyist to sponsor state legislation regarding unlicensed doctors. *McCormick*, 111 S. Ct. at 1809-10. During his reelection campaign, this state legislator informed the lobbyist that his reelection campaign was expensive and that he had not heard from the doctors. *Id.* at 1810. Subsequently, before and after the law in question was enacted, the state legislator received numerous cash payments. Neither the legislator nor the doctors' association reported the cash payments as campaign contributions.

The Supreme Court vacated the legislator's Hobbs Act conviction for extortion. *Id.* at 1818. In so doing, the Court stated that a conviction under the Hobbs Act for extortion requires "proof of a *quid pro quo*, i.e., a promise of official action or inaction in exchange for any payment or property received." *Id.* at 1813 & 1816-17. Medley contends that this same reasoning applies to a section 666 violation and that the government failed to prove that a *quid pro quo* situation existed or, in other words, that Flisk made any payment "in return for an explicit promise or undertaking" by Medley.

The Court's decision in *McCormick* does not compel the vacation of Medley's conviction. *McCormick* is both legally and factually distinguishable from Medley's case. *McCormick* involved the Hobbs Act, not a violation of 18 U.S.C.A. § 666. Additionally, the Court expressly limited its holding to campaign contributions. *Id.* at 1817 n.10. More importantly, however, even if the principles articulated in *McCormick* applied, Medley's argument fails on the merits.

Unlike the lower court's conviction in *McCormick*, Medley's jury properly focused on the *quid pro quo* requirement. The Seventh Circuit acknowledged that the "essential element of a section 666 violation is a 'quid pro quo'; that is, whether the payment was accepted to influence and reward an official for an improper act." *Medley*, 913 F.2d at 1260. Moreover, we agree with the Seventh Circuit that the jury understood section 666's requirements. *Id.* at 1261 (finding that "[n]o normal reasonable jury could have misunderstood what the indictment charge was about and what was required to find the defendant guilty"). Additionally, *quid pro quo* was argued to the jury. *Id.* And, the evidence amply supported the jury's determination that Medley's actions on behalf of Metropolitan were the *quid pro quo* for Flisk's promise to lease the commercial building. Indeed, the Seventh Circuit also found this to be the case. *Id.* (acknowledging that "Flisk mislabeled what he paid Medley as not being some form of bribery, but Flisk made it plain that the substantial down payment to Medley through the warehouse transaction was to induce Medley and reward him for trying to help Flisk save his valuable contract with the CTA"). Therefore, Medley's argument also fails on the merits and reliance on *McCormick* is misplaced.

We reject Medley's argument that evidence of an "explicit agreement" from Medley was required. *See Evans v. United States*, No. 90-6105, slip op. at 9 (May 26, 1992) (Kennedy, J., concurring) (implicit acknowledgement by official may form basis of *quid pro quo* requirement). We similarly reject Medley's argument that Flisk's payment *after* Medley's actions is somehow proof that no *quid pro quo* situation existed. This is incorrect because it was Flisk's agreement to lease the commercial building in exchange for Medley's "help" that formed the basis of the illegal agreement. Certainly, Medley could not avoid a conviction by simply postponing payment until some undetermined time period in the future. Therefore, we reject Medley's arguments to the contrary.

## CONCLUSION

For the foregoing reasons, we deny Medley's habeas petition to vacate his sentence pursuant to 28 U.S.C. §2255.

/s/ Charles P. Kocoras
Charles P. Kocoras
United States District Judge

Dated: July 16, 1992

# APPENDIX C

## IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. 89-3780

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

HOWARD MEDLEY,

*Defendant-Appellant.*

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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 CR 297—**Charles P. Kocoras**, *Judge.*

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ARGUED JUNE 5, 1990—DECIDED SEPTEMBER 21, 1990

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Before WOOD, JR., CUDAHY, and POSNER, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* At the outset of oral argument, defendant-appellant Howard Medley's distinguished appellate counsel[1] characterized the broad issue in this case to be, "Whether the judges of this court will give their mark of approval to the verdict of a misled jury and a conviction procured by the government that was and is unjust." There is arguably some support in the record upon which to base Medley's characterization of this case. From our

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[1] Former District Judge George N. Leighton of the Northern District of Illinois, now of the firm of Earl L. Neal & Associates, represented the defendant on appeal.

perspective, however, we conclude the jury was not misled and the government was not unjust in its prosecutorial actions. Reversal is not warranted. To understand the context in which this unusual case arises requires we look at its procedural history, and then examine in some detail the trial and the evidence.

## I. The Procedural History

In April 1988, the grand jury returned a forty-one count indictment against Medley and eight other defendants alleging numerous crimes related to fraud and bribery (the use of the term "bribery" is an issue in this case) involving the Chicago Transit Authority ("CTA") and the Metropolitan Petroleum Company ("Metropolitan"), a privately owned motor fuel supplier. Included as defendants, relevant to this appeal, were Brian Flisk, an officer of Metropolitan, and Metropolitan. Only three of the counts were against Medley. Medley was charged with mail fraud under 18 U.S.C. § 1341; accepting a thing of value with the intent to be influenced or rewarded under 18 U.S.C. § 666; and perjury before the grand jury under 18 U.S.C. § 1623. The following month a superseding indictment was returned against the defendants, but it contained no new allegations against Medley. The following September Judge Kocoras granted Medley's motion to sever his trial from the trial of the other defendants. Severance was followed in October by the return of another superseding indictment against only Medley. This indictment did not include the prior mail fraud count but did reallege the perjury and acceptance of a thing of value counts contained in the previous indictment. Newly added were a charge of conspiracy to violate section 666 under 18 U.S.C. § 371, and a charge of Hobbs Act extortion under 18 U.S.C. § 1951. Thereafter, Judge Kocoras dismissed the Hobbs Act and conspiracy counts. After eleven days of trial on the perjury and acceptance of a thing of value counts and three days of jury deliberations, the jury announced it was deadlocked and a mistrial was declared.

A third superseding indictment was then returned against Medley again charging him with extortion under the Hobbs Act (Count I) and acceptance of a thing of value under section 666 (Count II). The district court dismissed the Hobbs Act charge and trial proceeded only on the remaining section 666 charge.[2] During a six-day trial the defendant did not testify and presented no evidence in his own behalf. The defendant did offer some documentary evidence, but that was largely used by the government and is not significant in this appeal. The jury found Medley guilty of accepting and agreeing to accept $25,000 from Flisk with the intent to be influenced and rewarded in his duties as a CTA board member. Medley was sentenced to a thirty-month term of imprisonment and fined $10,000. This appeal followed.

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[2] Count II of the third superseding indictment charged:

> In or about January through April 1987, at Chicago, in the Northern District of Illinois, Eastern Division,
>
> HOWARD MEDLEY,
>
> defendant herein, being an agent of the CTA, an organization which annually received benefits in excess of $10,000 in federal funds under a program administered through the United States Department of Transportation, accepted and agreed to accept a thing of value, namely a payment of approximately $25,000 from Brian Flisk and Metropolitan Petroleum, intending to be influenced and rewarded in connection with business, transactions, and a series of transactions between Metropolitan Petroleum and the CTA involving a diesel fuel contract that Metropolitan Petroleum had with the CTA which had a value in excess of $5,000.
>
> In violation of Title 18, United States Code, Section 666.

The directly relevant portion of section 666 provides:

> [whoever] corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more . . . shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 666.

Medley raises three issues: 1) whether the trial court committed error in permitting the government to call Flisk as its witness; 2) whether the trial court committed error in instructing the jury; and 3) whether the trial court committed error in denying Medley's motion for acquittal made at the close of all the evidence and again following the guilty verdict on the basis that the evidence did not prove beyond a reasonable doubt that the money actually paid to Medley by a person named John Wilson was a thing of value from Flisk and Metropolitan as charged in the indictment.

## II. Factual Background

In the first trial, which resulted in a hung jury, Medley presented evidence in his defense, but in his second trial Medley presented little evidence of consequence. In examining the record we therefore have almost nothing to review except the government's evidence. When reviewing a favorable jury verdict we must view the evidence in the light most favorable to the government if it establishes that any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *United States v. Field*, 875 F.2d 130, 137 (7th Cir. 1989). The government is also entitled to all reasonable inferences from the evidence. *United States v. Douglas*, 874 F.2d 1145, 1151 (7th Cir.), *cert. denied*, 110 S. Ct. 126 (1989). The evidence heard and resolved by the jury is set forth in some detail.

In October 1986, Metropolitan, headed by Brian Flisk, entered into two, two-year contracts with the CTA to be the CTA's exclusive supplier of diesel fuel for its 2,200 vehicles. These contracts, totaling $38 million, were viewed as Metropolitan's largest and most important contracts. Flisk was awarded the CTA diesel fuel contracts by agreeing to provide the CTA with substantial discounts in the price per gallon of diesel fuel provided the CTA paid the fuel invoices within specified limited periods. Flisk also agreed to meet the CTA's Disadvantaged Business Enterprise or Minority Business Enterprise require-

ment. Flisk ostensibly complied with this latter requirement by specifying Casey Fuels as the minority-run subcontractor that would deliver part of Metropolitan's fuel to the CTA. A percentage of Metropolitan's profits under the contract, therefore, would pass to a minority business.

In entering into these contracts, with discounts for prompt payment, Flisk relied on his belief that the CTA would not be able to pay its fuel bills within the discount time, but the problems began when the CTA surprised him, and did. The CTA promptly paid the invoices and took the maximum price discounts. The result was that Metropolitan began losing money on its sales to the CTA. The financial effect on Metropolitan and Flisk was described as "devastating" by a Metropolitan official. Soon Flisk resorted to sending the invoices to the CTA late so as to prevent the CTA from remitting payment in time to take advantage of the discount price. Later, as an alternative, Flisk began sending inflated invoices so that even when the CTA could take advantage of the prompt payment discount, the CTA unknowingly still paid full price. The CTA's Internal Audit division became suspicious and began an investigation into Metropolitan and its CTA billing practices in late November and early December of 1986. In early January 1987, Flisk learned of the investigation after two Internal Audit investigators visited his company and spoke to his employees. Flisk feared that the possible loss of these CTA contracts would put Metropolitan out of business, and later in July 1987 that happened.

In late January or early February 1987, Howard Medley, a member of the CTA's Board of Directors, met his longtime friend Robert Sperling at a health club in Chicago. Sperling was a partner in a Chicago law firm. Medley knew Sperling from their prior work together at the Chicago Board of Election Commissioners. Sperling, his law partner Michael Zavis,[3] and several other individuals

[3] These individuals, Sperling and Zavis, are not implicated in any wrongdoing in connection with Metropolitan and the CTA.

co-owned a large commercial warehouse in Chicago that had just lost its tenant and was facing severe financial difficulties. Sperling told Medley that the partners were looking for a purchaser for the multimillion dollar property, and that a substantial commission would be paid to anyone who could secure a buyer. Medley was interested in trying to find a buyer.

While Medley was keeping an eye out for a buyer for the warehouse, Flisk was looking for someone to help him defuse the CTA investigation. Flisk turned to Medley for assistance in connection with the investigation. Howard Weitzman, Flisk's personal friend and Metropolitan business partner, set up a first meeting with Medley in Medley's CTA office. Later Medley, Flisk, and Weitzman had a second meeting which began in a restaurant and then moved to Medley's apartment. At the apartment meeting, Flisk and Medley discussed CTA matters, Metropolitan's fuel contract, and Medley's needed assistance with Metropolitan's "problem." Flisk, in his trial testimony, admitted that at this meeting he and Medley also had a discussion about the matter of purchasing the Sperling and Zavis warehouse. Medley suggested that Flisk purchase the building. Flisk learned that Medley would stand to gain a $300,000 commission if Flisk bought the building. Flisk was willing to pay a commission to Medley because Medley was "helping" him with the CTA investigation. In his testimony Flisk referred to Medley's CTA investigation help and the warehouse commission as a "quid pro quo."

After his apartment meeting with Flisk, Medley contacted Sperling and told him that he knew an individual who was interested in the warehouse property. On Medley's recommendation, Flisk and Weitzman looked at the warehouse, met with Sperling and other partners in the warehouse property, and began to negotiate for its purchase or lease. Medley, through Sperling, monitored the negotiations. At this time, a CTA ethics ordinance prohibited a CTA board member, which Medley was, from doing business with CTA vendors such as Flisk.

On February 20, 1987, at the same time Flisk was negotiating for the lease or purchase of the warehouse property, the CTA's Internal Audit division disseminated the report of its Metropolitan investigation to the CTA's Board of Directors, including Medley. That report documented and criticized Metropolitan's billing irregularities that prevented the CTA from paying the invoices in time to receive the discounts to which the CTA was otherwise entitled. The report also raised serious questions as to whether Casey Fuels was a legitimate minority enterprise subcontractor, or whether it was a sham pass-through corporation fraudulently misused by Metropolitan to meet the CTA's minority business requirements. Prior to the next full board meeting on March 4, 1987, the report was leaked to the press, and Metropolitan came under scrutiny and attack in the media.

During the public session of the CTA board meeting on March 4, 1987, board member John Hoellen pointed to the allegations in the Internal Audit report and moved to rescind and terminate the Metropolitan-CTA contract. Medley spoke out at the board meeting about a conversation he said he had had about the report with the CTA purchasing agent, Ed Tobin. Tobin, however, denied that he had spoken to Medley about the report. Potential litigation with Metropolitan was mentioned at the meeting. The investigation was then referred to the CTA Purchases and Sales Committee for a report back to the board.

The Purchases and Sales Committee was chaired by board member Natalia Delgado. During the ten-minute break between the public and closed sessions of the March 4 board meeting, Medley approached Delgado. Medley told Delgado that Casey Fuels was actually getting ready to deliver the fuel, and that unknown persons were "out to get Metropolitan because they didn't like minority subcontracts . . . ."

On March 6, 1987, two days after the board meeting, Medley called the CTA affirmative action staff head Larry Murphy into his office. Already present in Medley's office when Murphy arrived were Flisk and Clarence Casey,

owner of Casey Fuels. Medley told Murphy to prepare a report proving that Casey Fuels, the minority subcontractor, was participating in the Metropolitan contract. Murphy replied that he had no information to that effect, and Medley then directed Casey and Flisk to provide the information to Murphy.

Immediately after he spoke with Murphy, Medley called CTA senior staffer and purchasing agent Tobin into his office. Present at that time were Medley, Flisk, Casey, and Murphy. Medley told Tobin that he was looking into the minority subcontractor and invoicing allegations in the Internal Audit report. Tobin warned Medley not to discuss the matter in front of the vendors, Flisk and Casey, the subjects of the investigation, because of the possibility of future CTA litigation with them. This was the only time Tobin had ever seen a CTA board member attempt to discuss a disputed contract in the presence of the vendors. Tobin was so disturbed by Medley's conduct that he immediately went to the CTA staff chairman and wrote a memo detailing what had occurred in Medley's office.

A week later, again in the presence of Flisk and Casey and in direct contravention of Tobin's warning, Medley gave Murphy a stack of papers from Flisk, and told Murphy to "go back and take care of the minority." Murphy examined the papers and, considering them irrelevant, did not write any report. A week later, Medley again called Murphy into his office, and Murphy told him that the papers from Flisk did not prove anything. Medley responded, "O.K. That's all." Medley never reported to the CTA board that the CTA staff head of affirmative action had found Metropolitan's and Casey's evidence on the minority issue to be meritless.

On March 17, 1987, Internal Audit issued a second report critical of Metropolitan. This report noted numerous complaints about Metropolitan's diesel fuel quality pointing out that the percentage of impurities was too high in samples taken from Metropolitan delivery trucks. On March 19, 1987, CTA employees were told to start testing

Metropolitan's fuel by visual examination for particles and water. On that day, Byron Harvey, a twelve-year CTA employee who received fuel deliveries at a CTA garage, took a fuel sample from a Metropolitan delivery truck. Harvey believed the sample looked too light and cloudy for diesel fuel. Harvey took that sample to his supervisor Terry Short, a foreman with twenty-three years experience. Short decided to reject Metropolitan's fuel delivery. By the time Short had returned to the waiting Metropolitan fuel truck to tell the driver about the rejection, Flisk had pulled up in his car. Within minutes of Flisk's arrival, Medley also arrived in his car. Both Short and Harvey noted that they had never seen Medley at the garage either before or since that time. Phone records indicated a number of calls from Flisk's car phone to Medley's car phone just before Medley arrived at the garage. Flisk admitted that he had called Medley to assist him at the garage.

When Medley arrived at the garage he talked to Flisk first, and then he and Flisk approached supervisor Short. Short told Medley that the fuel sample was taken from the truck, and that it was too cloudy. Medley said that the fuel looked "acceptable" to him. Short then accepted the load, not wanting to countermand the implied directive of a CTA board member.

There was evidence of other phone calls on March 19 by Medley. From his home, Medley called Delgado at her law office and told her that Casey Fuels was delivering the fuel, and that fuel samples were being erroneously taken from underground tanks, not the delivery trucks. Delgado testified that the phone call was unusual because Medley never called her about substantive board matters, except once to ask her to vote for him as a committee chairman. Medley scheduled a personal meeting with Delgado for the next day to discuss the Metropolitan issue, but Delgado had to cancel the meeting because of an emergency legal matter at her office. Immediately after hanging up with Delgado, Medley called Sperling. Phone records for the remainder of the day showed numerous

calls between Medley and Flisk, Medley and Sperling, Flisk and Sperling, and Medley and John Wilson, Medley's accountant who later accepted a $25,000 check from Flisk delivered to him by Weitzman for Medley.

On March 24, the day before a scheduled CTA Purchases and Sales Committee meeting, Medley called Delgado at her office. Medley again told Delgado that Casey Fuels was in fact delivering fuel under the contract. He told her he had gone to examine water seepage at the CTA's underground fuel tanks, and that the Metropolitan fuel quality samples were inaccurate because they were being taken from water-soaked fuel tanks, not the Metropolitan delivery trucks. Medley also told her that people were "out to get Metropolitan Petroleum." Medley did not tell Delgado that he had gone to the garage the previous week at Flisk's behest, that the sample at the 69th Street garage was taken from the Metropolitan truck, or that there was no water over the fuel tanks at that garage.

On March 25, 1987, the Purchases and Sales Committee met to discuss the allegations raised in the Internal Audit reports and to decide whether to recommend terminating the Metropolitan contract. Delgado reported to the committee what defendant Medley had told her about Casey Fuels delivering the fuel, and offered Medley's explanation for the questionable fuel quality samples. Based upon the information provided to Delgado by Medley and other information, the committee decided to recommend against terminating the contract.

Around the time the committee was investigating the Metropolitan allegations and relying on Medley's information to Delgado, Medley had a conversation with Zavis in Zavis's and Sperling's law offices in late March 1987. Zavis told Medley that the real estate partnership could not afford to pay Medley any commission on the warehouse real estate deal, but that Zavis would negotiate with the buyers, Flisk and Weitzman, to pay the commission to Medley. Zavis told Medley that he would get

one-half of the total commission, and that Zavis and Sperling would each get one-quarter. Zavis then had a meeting in late March with Flisk, during which Flisk agreed to pay a $300,000 commission on the warehouse transaction, with $150,000 to go to Medley and another $150,000 to be divided between both Zavis and Sperling.

Also in late March 1987, Sperling called Medley and told him that a master lease agreement for the warehouse deal with Flisk was about to be consummated. Sperling told Medley that the deal would generate a commission payable to a licensed Illinois real estate broker but that Medley could not split the commission because Medley was not a licensed broker. Sperling also told Medley that he could not receive any money from the commission, directly or indirectly through another broker. Sperling told Medley that Medley could either designate a real estate broker of his choice to accept his share of the commission as a favor to the broker, designate a charity to which his share of the commission could be paid, or request that his share of the commission be paid as a political contribution to Medley's political party. Defendant Medley said that he wanted to consider the matter and that he would get back to either Zavis or Sperling. A short time before March 31, 1987, Medley called Zavis and told him that John Wilson was to receive Medley's commission. Medley gave Wilson's telephone number and address to Zavis. Zavis called Wilson, learned that he was a licensed real estate broker, took his name so that the commission check could be made out correctly, and gave the information to Flisk's attorney.

Medley had a meeting with Wilson to discuss Wilson's receipt of the payment in his behalf. Wilson was Medley's certified public accountant, but he also had a real estate broker's license. Wilson had used his real estate license only twice in twenty-four years but had never used his license in a commercial real estate transaction. Medley told Wilson that he had earned a fee in a real estate transaction but that the people involved "were balking about it" because they wanted a licensed real estate

broker "to accept the money." Medley then told Wilson that he wanted him to accept the money for him. With Medley still in his office, Wilson called his lawyer and asked him about Medley's suggestion. Wilson told Medley that the lawyer advised him that he could not share a commission with a nonlicensed broker, but if the commission were viewed as a finder's fee then his lawyer would research the law to determine the legality of that arrangement. The lawyer told Wilson that he would get back to him but never did. Wilson and Medley had no further conversations about the legality of sharing the fee. Medley never told Wilson any of the specifics of the transaction. Wilson never knew the type of real estate involved, the size of the deal, the location of the property, or about the CTA-Metropolitan problems.

While the real estate deal was drawing closer to completion, the CTA Board of Directors discussed the allegations about Metropolitan at its closed session on April 1, 1987. Medley and Delgado were in attendance. Delgado reported that her committee recommended against terminating the Metropolitan contract which, she explained, was based on the same information that Medley had provided her prior to her committee meeting on March 25, 1987.

Medley also spoke at the April 1 board meeting in support of Metropolitan. Medley's statements to the board contained numerous falsehoods. Medley stated that he had gone out to the CTA garage and found a foot of standing water around the underground fuel tanks. That was not true. On the date of his only visit to the garage there was no water over the tanks. There were a few puddles in the garage area, but they were at most less than an inch deep. Medley also told the board that the garage employees told him that the fuel samples came from the underground tanks not the delivery trucks. This also was false. Harvey had taken the sample from the truck, and Short had specifically told Medley that the sample was taken from the truck.

At this April 1 board meeting Medley did not disclose to the board that he had had numerous meetings and con-

versations with Flisk during the same period in which the CTA was investigating Flisk, nor did he disclose that he also had had several meetings with Casey, the minority subcontractor. Medley also did not disclose that he had visited the CTA garage with Flisk and had personally found a rejected load of Metropolitan fuel at the garage to be "acceptable"; nor did he disclose that he was involved with Flisk in a real estate transaction in which he was to receive $150,000 from Flisk. After Delgado made her committee's recommendation to the board on April 1, the board voted not to terminate the Metropolitan contract. Delgado testified that as a board member, if she had known about the relationship between Flisk and Medley, she would not have given Medley's statements "anywhere near the weight that I gave them," and that she would not have reported Medley's statements to her committee but instead would have reported the Medley situation to the CTA's attorney.

On April 10, 1987, less than two weeks after the board's favorable decision, Medley met with Sperling at a club in Chicago. Sperling told Medley that Flisk and Weitzman were preparing to pay the real estate commission but that they were having cash difficulties and wanted to pay a portion of the commission in installments. Sperling told Medley that Flisk wanted to pay $150,000 of the $300,000 commission at the time of the signing of the deal but then pay the balance of $150,000 in six monthly installments of $25,000 each. Because Sperling and Zavis said they were having difficulties negotiating with Flisk, Sperling informed Medley that he and Zavis wanted their full half of the commission at the time of the signing and that Medley's designated broker should take the six monthly installments of $25,000 from Flisk. Medley agreed to that proposal.

Shortly before April 14, 1987, Medley called Wilson and told him that a man named Weitzman, the Metropolitan associate of Flisk, would be bringing over the $25,000 check for Medley. On April 14, 1987, Flisk and Weitzman went to Sperling's office and wrote out a $150,000 check

to Zavis, which was Zavis's and Sperling's half of the commission. Flisk then told Weitzman that Weitzman would have to deliver Medley's check to Medley's broker. Weitzman called Wilson to make sure he would be in his office to receive Medley's check. Later that day, Weitzman delivered the $25,000 check to Wilson. Wilson then called Medley to tell him he had his money. Medley instructed Wilson to write Medley a check for $22,500, and for Wilson to keep $2,500, or ten percent, for his trouble. The next day, Wilson deposited the Flisk check, and the day after that gave Medley a $22,500 check for the net balance of the first payment from Flisk. Wilson testified that his only role in the warehouse deal was as a middleman who made a few phone calls, accepted the check, and then gave Medley his money.

In early July 1987, the CTA terminated the Metropolitan contract for fraud. In April 1988, Medley was required to file an economic interest statement with Cook County for 1987, listing "any kind of payment from anyone having a contract or doing business with the CTA." The statement required disclosure of "any payments" from and "any financial relationships" with CTA vendors. Medley did not list the $22,500 payment from Flisk. Medley did list a $22,500 "finder's fee" on his income tax return filed at about the same time with the Internal Revenue Service, but the source of the fee was not shown on the tax return.

## III. Analysis

As a prelude, Medley asks us to consider and re-examine the conduct of the assistant United States attorneys who worked on this matter through its earlier stages. Specifically, Medley complains about the original joinder, alleged prosecutorial misconduct, and abuse of the grand jury process. Those matters, however, were all previously resolved by the trial judge in Medley's favor, leaving only the one count for trial in this case. Those prior matters are not specifically made issues on appeal, only obliquely, apparently in an endeavor to show a pattern of

government unfairness which Medley claims clouded all the proceedings. We will consider only the unresolved issues which Medley specifically raises arising out of this particular trial.

A. *Government Witness Flisk*

The first relevant issue is the government's calling of Flisk, the principal officer of Metropolitan, as its witness. The government did not call Flisk in the earlier hung jury trial. After that time, however, on March 3, 1989, Flisk entered a plea of guilty to charges in the related indictment. The government advised Medley's counsel that under a grant of immunity the government would call Flisk in this trial. Medley responded on August 23, 1989, with a motion in limine.

Medley's motion in limine was not directed to Flisk's guilty plea, only to the use of Flisk's proffer to an FBI agent in 1987. The motion argued that this proffer, not otherwise admissible, would be used to impeach Flisk once he testified and exculpated Medley. Medley alleged that the only purpose in calling Flisk was to impeach Flisk and then to put Flisk's otherwise inadmissible proffer before the jury. The court denied the motion.

Flisk testified on direct about his grant of immunity and pleas of guilty to two counts of the related but separate indictment, and that was, Medley emphasizes to us, before the same judge, Judge Kocoras, who had previously accepted Flisk's guilty plea.[4] Flisk testified that he had pled guilty to racketeering, one of the allegations of which concerned the $25,000 he had paid to Medley through the warehouse transaction. Flisk also related that he had pled guilty to wire fraud. During Flisk's testimony, the government asked several questions implying that Flisk was not testifying truthfully. He was shown the transcript of his grand jury testimony and of his change of plea proceeding,

[4] Flisk was sentenced to four years incarceration.

and, over an objection by Medley's counsel, Flisk read a portion of his plea agreement to the jury. This was all subterfuge to get inadmissible evidence admitted by way of impeachment, Medley now argues. Furthermore, Medley claims, the jury was permitted to take the plea agreement and change of plea transcript to the jury room during deliberations without the benefit of any limiting instruction about these documents.

The government responds by pointing out that Medley's motion in limine was addressed only to the exclusion of Flisk's proffer statement which Medley claimed would be used by the government to impeach Flisk. Medley's argument to us, however, is that the government improperly called Flisk to impeach him, not with the proffer statement but with his plea agreement and plea colloquy statements. In denying Medley's motion in limine, the district judge, who had accepted Flisk's guilty plea, found that there was a basis for the government to call Flisk without expecting him to exculpate Medley. The court described Flisk as a "central player" whose testimony the jury should hear. The court found "no reason" to believe the government was engaged in a subterfuge to impeach Flisk with his prior proffer, and that there was no basis to exclude Flisk from testifying. The court would not assume that Flisk would be untruthful under oath before the jury.

After Flisk testified and on six occasions failed to testify consistently with his plea colloquy and grand jury testimony, both of which were under oath, the court noted that Flisk's proffer, the only subject of the in limine motion, had not been used or raised. That motion, the court observed, proved to be meritless and what Medley had accused the government of attempting improperly to do was never attempted. Later, during post-trial motions, the court described Medley's position as "unreasonable," "unmeritorious," and "unsupported." Since the plea agreement and plea colloquy were not raised in the district court, our review is for plain error under FED. R. CRIM. P. 52(b).

In reviewing the propriety of the government's decision to call a codefendant as a witness and then to impeach

him, we apply a "good faith" standard. The government is permitted to impeach a codefendant even though called by the government, *United States v. Peterman*, 841 F.2d 1474, 1479 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 783 (1989), but we do not allow impeachment where it is merely a government subterfuge to get before the jury evidence otherwise not admissible. *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984). It is a matter of the government's "good faith." *Webster*, 734 F.2d at 1192-93. This court affords great deference to the district judge who presided at trial. In this instance, the judge presided at both relevant proceedings.

As the trial court found and as is obvious from the record, the government's purpose was to elicit testimony from Flisk in accordance with his prior statements under oath. Briefly, this most important and central figure testified that he sought Medley's assistance as a CTA board member to protect Metropolitan from the CTA's investigation. Flisk also testified that he had two key meetings with Medley early after the investigation had started at which they discussed Medley providing Flisk and Metropolitan help with the CTA "problem." Most importantly, Flisk testified that this discussion was "in connection" with Medley's suggestion that Flisk consider the purchase of the warehouse offered by Sperling and his partners. Flisk testified one of those meetings was in Medley's apartment. Further, he acknowledged that he was responsible for providing the $25,000 check partial payment for Medley and that Wilson was only an intermediary to accomplish the deal. It was also, Flisk testified, part of the "quid pro quo" with Medley when Medley came to the garage to "help" him when the Metropolitan fuel delivery was about to be rejected. Part of the reason for the payment of the money to Medley, Flisk explained, was to keep Medley's friendship and alliance. This adverse testimony from Flisk came from his own admissions on the stand. Flick's impeaching statements from the grand jury or plea proceedings were not used to introduce otherwise inadmissible hearsay. The government introduced Flisk's

guilty plea at trial over objection from Medley. This is an approved practice by the government so as to blunt the impact of the guilty plea on cross-examination. Flisk was of much more testimonial value to the government than merely having the jury know that Medley's cohort had pled guilty. The trial court followed up this Flisk plea evidence by giving the Pattern Seventh Circuit Jury Instruction which provides that evidence that a witness has been convicted of a crime could be considered only so far as it might affect the credibility of the witness. *See United States v. Davis*, 838 F.2d 909, 917 (7th Cir. 1988). This circuit is not alone in this view.[5]

Even though we find no reversible error in the government's use of Flisk, it is very interesting to note that Medley's trial counsel ably tried to turn Flisk's testimony to Medley's advantage by showing that it was Flisk who was guilty, not Medley. On cross-examination, Medley's counsel explored other aspects of Flisk's guilty pleas ignored by the government. During that cross-examination, defense counsel secured emphatic denials from Flisk that he had "bribed" Medley. Flisk's testimony was used advantageously by Medley's counsel in closing argument to the jury and even in arguing the motion for judgment of acquittal at the close of evidence. It appears that Flisk was of great value to the government and at the same time was about all the defense Medley had, such as it was. It is unconvincing and without legal substance that on appeal the government's calling of Flisk as a witness should be regarded as reversible error. It was Medley, not the government, who chose Flisk for an accomplice. Conspirators are usually not model citizens, but the government can only gather its evidence where it finds it. This situation was well described in *United States v. Karnes*, 531 F.2d 214, 217 (4th Cir. 1976):

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[5] *See, e.g., United States v. Henderson*, 717 F.2d 135, 137 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984); *United States v. Baez*, 703 F.2d 453, 455 (10th Cir. 1983); *United States v. Wiesle*, 542 F.2d 61, 62 (8th Cir. 1976).

> In many cases the prosecution must depend upon the testimony of persons who are co-defendants, co-conspirators, felons, accomplices, etc., and such witnesses often evidence hostility, are impeachable from their past or current activities, or change or slant their testimony from what, based upon prior statements, the government expects them to say. Under such circumstances, a district judge may afford wide latitude to the government to lead, to cross-examine, and partially to impeach such witnesses.

In our view the government would have been derelict in its prosecutorial responsibility had it not called Flisk, the central figure as he was labeled by the trial judge, for Flisk to testify about his and Medley's unfortunate scheme. We find no error.

B. *The Offense Instruction*

During Medley's first trial, the government consistently referred to the charge against Medley as "bribery," but avoided the use of that term in this trial and opposed Medley's requested jury instruction on "bribery." The trial court did not give Medley's proposed "bribery" instruction, which raises an issue that it appears to us could reasonably and fairly have been avoided by the government. The trial judge, outside the presence of the jury, characterized "bribery" as merely a "shorthand way" of explaining the statutory charge against Medley. We agree, and also agree that a "shorthand" explanation of the charge was not absolutely necessary in view of the other instructions given. The term "bribery" appears in the section caption, but not in the language actually defining the crime. The caption, however, does not control. *Brotherhood of R.R. Trainmen v. Baltimore & O. Ry.*, 331 U.S. 519, 528 (1947). The caption is not a part of the statutory crime definition. *Patterson v. Bark Eudora*, 190 U.S. 169, 172-73 (1903).

We note that the government's refusal to use the term "bribery" in this trial may have been motivated by an

effort to mitigate Flisk's denials on cross-examination that he had actually "bribed" Medley. Flisk did admit, however, that it was a "quid pro quo" situation. But whatever reason the government may have had for its opposition to the use of the term is of no consequence. The government offered an instruction which was given that set forth the offense using the language in the body of section 666. The statute is not complex. The instruction given should not have been difficult for lay jury persons to understand. That suffices.

In its opening argument, possibly anticipating Flisk's use of the term, the government informed the jury that Medley was not charged with "bribery," but "influence peddling." While the government's statement might be considered technically correct, the distinction did little to clarify the issue for the jury. The trial judge could have chosen to elaborate on the term "bribery" in a jury instruction, but using his discretion the trial judge chose not to do so. In view of the statutory definition given along with the other instructions, we see no reversible error. *See United States v. Grier*, 866 F.2d 908, 932 (7th Cir. 1989).

C. *The Issue Instruction*

With some justification, Medley also complains about the intent element of the section 666 issue instruction given to the jury. The section 666 offense was defined in the instruction as a prohibition against the giving or receiving of anything of value for the purpose of influencing or being influenced in connection with any business transaction or series of transactions. The instruction, however, failed to state that it all had to be done "corruptly." The term "corruptly" is the first word in section 666(d)(1)(B) defining the particular charge. It is difficult to understand why the statute was not fully and correctly tracked in the instruction when the government conceded that corruption is an aspect of the charge. The government argued to the jury that Medley acted with "corrupt intent." In addition to urging that the instructions as a whole suffice, the

government would have us, as an alternative, adopt what we regard as a strained reading of section 666. The government explains that the statute's use of "corruptly" applies only to the elements first set forth in the sentence and not to the elements mentioned in the last part of that same sentence.[6] The trial judge agreed. "Corruptly" by that reading would be an element if one is charged with soliciting or demanding anything of value intending to be influenced, but it would not be if the charge was accepting or agreeing to accept a thing of value to be influenced. "Corruptly" was viewed as modifying only the terms which immediately followed it but not the next following terms in the same sentence. We prefer to interpret this statute according to reason and not by trying to apply a grammatical rule. The government does not suggest why Congress saw some distinction in those nuances of the same offense so as to require one to be corruptly done and the other to be done with some other undefined evil intent. The government points to another part of the criminal code, 18 U.S.C. § 215(a)(2), which in using similar language repeats the term "corruptly." That is a different statute. That section may be considered more clearly written, but section 666 is clear enough.

Medley therefore claims that the jury was not specifically instructed in terms of corruption and that the offense requires a specific state of mind showing an intent to accomplish an illegal end by unlawful means. It is true, as Medley points out, that the jury must be instructed to

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[6] That sentence, also set forth in footnote two, is repeated here for convenience:

> [whoever] corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more . . . shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 666.

find each element of the crime under the proper standard of proof. Failure to accurately define the essential elements of the offense charged is "grave" error. *United States v. Hiscott*, 586 F.2d 1271, 1274-75 (8th Cir. 1978). There can be no argument that to omit or misstate an essential element of the crime intended to be charged is serious and possibly fatal, as in *Hiscott*. *Hiscott* involved a charge of transportation of a stolen vehicle moving in interstate commerce, but the instruction given suggested only that the stolen vehicle had at some previous time been in interstate commerce but not at the time charged. The defendant had objected to the instruction on that basis and no other instruction was found to cure the misstatement. The same is not true in the present case.

There is more to the government's argument, however, than the unnatural reading and interpretation of the one statutory sentence at issue. The government points out that there was no objection to the instruction from Medley's counsel. Therefore, we review the omission on a plain error standard. *United States v. Douglas*, 818 F.2d 1317, 1320 (7th Cir. 1987). That requires us to determine from an examination of the entire record whether or not the defective instruction had a probable impact on the jury's finding of guilt. *United States v. Markowski*, 772 F.2d 358, 363 (7th Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986). We will reverse for plain error only when otherwise it would be a "miscarriage of justice." *United States v. Silverstein*, 732 F.2d 1338, 1349 (7th Cir. 1984), *cert. denied*, 469 U.S. 1111 (1985).

But this was no ordinary plain error situation arising from a mere failure of Medley's counsel to object to the instruction which did not mention "corruptly." Medley's trial counsel actively contributed to this intent problem. Not only did Medley's trial counsel not object to the given instruction, but counsel submitted defendant's own element instruction which itself did not incorporate the term "corruptly." He urged his instruction be given and it was insofar as is relevant to this issue. Medley's instruction raised only the question whether "Medley accepted and

agreed to accept" the payment, and whether "the fee or compensation paid was not a bona fide fee paid in the usual course of business." Medley on appeal claims that what was in effect his instruction is now grave error. There is no claim that Medley's own trial counsel was guilty of rendering him ineffective assistance. The government adds to this plain error argument the fact that Medley's objection comes "only after massive public and private resources were committed to conducting this retrial." That economic argument is irrelevant to our determination of whether there has been a miscarriage of justice, or whether the error had a probable impact on the jury's verdict. The government itself contributed to some of the economic problems about which it now complains. Some waste of time and money of all concerned, including this court, could have been easily avoided. As we have mentioned, Medley would have us review various alleged acts of government prosecutorial impropriety in the total proceedings, which we declined to do. The government's economic argument would, however, reopen those irrelevant issues.

Medley did not object that the various indictments in which he was named also did not track the statute to include the term "corruptly." Even so, the government argued the case as if "corruptly" was the standard. Any possibly adverse impact on the government's case to have fully stated the charge could only have been imperceptible.

Nor is this a case where some distinction has to be drawn between a bribe and a gratuity, which are both illegal under different parts of the statute. In practice those two charges, in which the intent involved is important, have been difficult to distinguish. *United States v. Strand*, 574 F.2d 993, 995 (9th Cir. 1978); *United States v. Arroyo*, 581 F.2d 649 (7th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974). The essential element of a section 666 violation is a "quid pro quo"; that is, whether the payment was accepted to influence and reward an official for an improper act. We do not need to make the closer bribery-gratuity intent analysis as in this case it was either

a real estate fee or it was corruption, between which there is a distinct line. The instruction given, even without using the word "corruptly," would not permit a finding of guilt on some gratuity or real estate fee analysis. In *United States v. Isa*, 452 F.2d 723, 725 (7th Cir. 1971), we found nothing in the amendment of a prior bribery section adding the word "corrupt" to enlarge the meaning of the intent element of the offense of bribery of public officials.

The jury was instructed that to find Medley guilty he had to be found beyond a reasonable doubt to have accepted the $25,000 from Flisk intending to be influenced or rewarded in connection with the problem between Metropolitan and the CTA. The jury was specifically admonished that Medley could not be found guilty, however, if the $25,000 he received was a bona fide fee paid in the usual course of business. No normal reasonable jury could have misunderstood what the indictment charge was about and what was required to find the defendant guilty. Corruption was argued to the jury. Quid pro quo was argued to the jury based on the explicit quid pro quo testimony of Flisk. Flisk mislabeled what he paid Medley as not being some form of bribery, but Flisk made it plain that the substantial down payment to Medley through the warehouse transaction was to induce Medley and reward him for trying to help Flisk save his valuable contract with the CTA. The jury was told that it had to find that Medley accepted or agreed to accept the payment intending to be influenced or rewarded in the performance of his official duties. That is plain, simple, and adequate. The evidence shows Flisk got what he paid for from Medley. Medley did his best to earn the illegal payments from Flisk. "Corruptly" in the context of these factual circumstances was self-defining. The use of the word "corrupt" was not critical for the jury to understand that Medley was paid for improper actions on behalf of Flisk. That is bribery and corruption, nothing else—as the trial judge said it was—"shorthand bribery." The way the word "corruptly" was used or not used does not justify a reversal.

D. *Medley's Acquittal Motions*

Finally, Medley argues that the district court erred in denying his motions for acquittal at the close of all the evidence and again when a similar motion was made after conviction. He claims that even when construed most favorably to the government, the evidence was insufficient to prove him guilty beyond a reasonable doubt. *United States v. Marquardt*, 786 F.2d 771, 780 (7th Cir. 1986).

Medley concedes that the government proved some things, including that he got the money and that he interceded with the CTA for Flisk. Medley argues, however, that he actually accepted nothing of value from Flisk intending to be influenced and rewarded in connection with his official duties. Medley argues that the check came not from Flisk, but through Medley's accountant from the lawyers selling the warehouse to Flisk. The payment and Medley's actions to assist Flisk are apparently viewed as unrelated. That unrealistically distorts the evidence.

It is apparent from merely reviewing the facts that we have set forth that the warehouse transaction had some legitimate aspects, but so far as Medley was concerned it was a timely, useful, and apparently risk-free subterfuge to receive the influence and reward money from Flisk under what would appear to be a legitimate overlay. It likely looked to Medley like a most fortunate and timely culmination of circumstances to permit him to safely enrich himself by misuse of his office. A wise jury, however, saw through the Medley-Flisk subterfuge. To weigh the evidence and judge the credibility of the witnesses is the responsibility of the jury, and that is where we shall leave it.

Medley's appellate counsel has said everything that could possibly be said in Medley's behalf, but we are constrained to find that the conviction must stand.

AFFIRMED.

# APPENDIX D

*(Letterhead Of)*
Chicago Transit Authority

Clark Burrus
Chairman
Chicago Transit Authority

Merchandise Mart Plaza
P.O. Box 3555
Chicago, Illinois 60654

December 13, 1989

Honorable Charles Kocoras
U.S. District Judge
Northern District of Illinois
c/o Mr. Greg Prestipino
219 South Dearborn
Room 2103
Chicago, Illinois 60604

RE: Character Reference for Howard C. Medley, Sr.

Dear Mr. Hill:

It is with pleasure that I take these moments to reflect upon my friend and colleague, Howard C. Medley, Sr. I have known Howard Medley for close to a decade and a half in all contexts (commercial, social and political). I have worked with him and observed him working with others. During this entire period, Mr. Medley has acquitted himself admirably and honorably both on the professional and interpersonal levels. He has shown himself to be conscientious, hard working and a person of high integrity.

Perhaps no activity better exemplifies Mr. Medley's spirit than his term as a Board member of the Chicago Transit Authority. No Board member worked harder for, or was more dedicated to, the organization than Howard Medley.

He immersed himself in analysis of the day-to-day activities of the Authority and was known to question managers and rank-and-file employees alike in his quest for perfection for the agency. Howard Medley was selfless in his propensity to help those in need. No rider complaint was too mundane to warrant an answer, and no vendor's question was too insignificant to merit inquiry. He was constantly on the streets and at the garages, criticizing here, questioning there, all in his quest to make sure the trains and buses ran on time and safely.

Whatever the unfortunate circumstances which have brought Howard Medley to his present estate, there are several facts which cannot be doubted. He loved the Chicago Transit Authority and he was dedicated to the Chicago Transit Authority. One can only hope that his years of dedication and his unqualified love for the CTA will not be lost sight of as he faces the difficult days ahead.

Very truly yours,

/s/ Clark Burrus
Clark Burrus

CB:ddp